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No. 92-1661

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

JAMES ROBERT WINKLEMAN,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Case No. 90-50109

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

FRED D. HEATHER*
KATHLEEN A. MORAN
McKENNA & CUNEO
444 South Flower Street
8th Floor
Los Angeles, CA 90071-2909
(213) 688-1000
Counsel for Petitioner

* Attorney of Record

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

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James Robert Winkleman ("Petitioner") hereby replies to the opposition of the government ("Respondent") to his petition for a writ of certiorari and respectfully requests this Court to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

I.

THE EXCLUSION OF EVIDENCE CONCERNING THE LACK OF VALUE ASCRIBED FREQUENT FLYER MILES DENIED MR. WINKLEMAN THE FUNDAMENTAL RIGHT TO PRESENT A DEFENSE.

Two points raised by Respondent in its Opposition Brief warrant further attention because they reveal important concessions by Respondent and highlight the serious problems Respondent faces in defending the conviction of Mr. Winkleman. First Re-

spondent implicitly admits that frequent flyer miles have no value. [Opp. 6.][1] Second Respondent asserts incorrectly that Mr. Winkleman was free to testify about his lack of intent at trial. [Opp. 8-9.] This statement directly contradicts what happened at trial, and at the same time, acknowledges how crucial such testimony was to Mr. Winkleman's defense. Taken together, rather than opposing Mr. Winkleman's petition, Respondent's statements illustrate the merit in Mr. Winkleman's position and serve as additional reasons for granting Mr. Winkleman's petition for a writ of certiorari.

A. The Government Admits That The Value Of Frequent Flyer Miles Is Relevant By Defining The Alleged Scheme As The Act Of Coupon Brokering.

Respondent concedes that a proper conviction of Mr. Winkleman for mail and wire fraud required the prosecution to show that Mr. Winkleman defrauded American Airlines of something of value. [Opp. 6.] Respondent then attempts to find something of value in this case by casting its legal net around conduct which the trial court specifically instructed the jury was legal. [R.T.T. 1018.] Specifically, Respondent seeks to bring coupon brokering within the scope of the alleged illegal scheme to support its point that the value of frequent flyer mileage was irrelevant. Respondent claims that Mr. Winkleman "sought to obtain, and did obtain things of value from American — airline tickets." [Opp. 6.][2] The government then argues that because Mr. Winkleman used American's frequent flyer program to give

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[1]"Opp." refers to Respondent's Brief in Opposition. Other references found in this reply represent the following: "R.T.S." refers to the sentencing transcript dated February 5, 1991. "R.T.T." refers to the Seven Volumes of trial transcripts. "E.R." refers to Excerpts of the Clerk's Record.

[2]Petitioner does not concede as the government claims (Opp. 4), nor has Petitioner ever conceded, that airline tickets *issued in exchange for certificates obtained with frequent flyer miles* have any value whatsoever. Tickets issued in exchange for American Airlines frequent flyer certificates are non-transferable, have a stated face value of $0, have no fair market value, cannot be refunded or exchanged, and American restricts

airline tickets to people other than those intended by the airline, *i.e.*, the frequent flyers, he violated federal mail and wire fraud statutes. Respondent's position might have some merit if coupon brokering were illegal; however, as the district court instructed the jury, it is not. [R.T.T. 1018]

Coupon brokering, as defined by a government witness, is receiving mileage credit for flights, accumulating a specific amount of mileage credits, and redeeming those credits for free travel, discounted travel or upgrades in the class of service flown. [R.T.T. 424-25.] Coupon brokers pool miles by having people who earn miles transfer the mileage to accounts controlled by the broker. The brokering consists of taking those miles and giving them or selling them to another party. [R.T.T. 425.] If Mr. Winkleman's *acquisition* of the miles did not violate the mail or wire fraud statutes, then there was no violation of the statutes. The obtaining of frequent flyer airline tickets and their sale by people other than those who flew the miles is not illegal. Therefore, the question of whether frequent flyer miles have any value is the *only* relevant inquiry when determining whether American was defrauded of anything of value. The question Respondent seeks to focus on, whether tickets issued in exchange for frequent flyer miles have value, is irrelevant.

The Court of Appeals for the Ninth Circuit erred by summarily affirming the district court's exclusion of all evidence regarding the lack of value ascribed frequent flyer miles. The district court refused to permit Mr. Winkleman to introduce either testimony or other evidence demonstrating that frequent flyer miles have no value. The district court granted the government's motion *in limine* excluding all such evidence, and Mr. Winkleman would have violated the court's order had he attempted to introduce such evidence.

While Mr. Winkleman's conduct may violate the rules of American Airlines' frequent flyer program, it is not a federal crime. A person who transfers or receives mileage in violation of the program's rules may be subject to penalties imposed by the

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their usage in such a way that the user does not replace a fare-paying passenger but occupies an otherwise empty seat.

airline, but such a person should not be subject to federal prosecution. The government has gone fishing with a net not suited to the fish American Airlines wishes to catch. By upholding the decision to exclude the evidence proffered by Mr. Winkleman, the Ninth Circuit denied Mr. Winkleman the opportunity to negate essential elements of the crimes charged. The lower courts' actions are a violation of due process, in that they denied Mr. Winkleman the opportunity to present a defense.

B. Mr. Winkleman Was Not Free To Testify That He Lacked Intent.

Respondent incorrectly asserts that Mr. Winkleman was "free to testify he lacked intent to defraud because he believed that his scheme did not defraud American of anything of value" and that "the district court did nothing to preclude such testimony." [Opp. 9.] This second argument by the government seeks to rewrite what happened at trial in an attempt to obscure the fact that Mr. Winkleman was denied his right to present a defense. The argument is belied by the facts, however, and illustrates the importance of the right denied to Mr. Winkleman.[3]

The government admits that if Mr. Winkleman established that he believed what he was doing did not defraud American of anything of value, he would negate the intent element of the

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[3]The government is also wrong in its assertion that *Cheek v. United States*, 498 U.S. 192 (1991) has nothing to do with this case. The government claims that the mail and wire fraud statutes involved here are not analogous to the tax statute at issue in *Cheek*. To the contrary, the jury instruction defining specific intent given by the judge in this case is essentially the same as in *Cheek*. In this case the judge instructed the jury that "specific intent, as the term implies, means more than the mere general intent to commit the act. To establish specific intent, the prosecution must prove beyond a reasonable doubt that the defendant knowingly did an act which the law forbids, *purposely intending to violate the law*." [R.T.T., pp. 1007-1008] (Emphasis added). In *Cheek*, this Court defined specific intent in substantially the same terms: "willfulness in this context simply means a voluntary, *intentional violation of a known legal duty*." *Cheek*, *supra*, 498 U.S. at ____, 111 S. Ct. at 610 (emphasis added).

crimes charged. [Opp. 9.] By this admission, the government concedes that the ability to present evidence regarding lack of value was crucial to his good faith defense. The evidence proffered by Mr. Winkleman that frequent flyer miles have no value and were not the property of American Airlines would have supplied the basis for his only defense.

The district court prohibited Mr. Winkleman from introducing any evidence regarding value and also prevented defense counsel from arguing this defense to the jury. The district court's actions denied Mr. Winkleman the opportunity to explain to the jury why he believed that he did not take anything of value from American Airlines, and the government is simply wrong when it states otherwise. The Court of Appeals' decision does not address this error, and its actions violate Mr. Winkleman's Sixth Amendment right to present a defense.[4]

II.

DUE PROCESS REQUIRES COURTS DETERMINING SENTENCES UNDER THE FEDERAL SENTENCING GUIDELINES TO MAKE SPECIFIC FINDINGS CONCERNING ALLEGED FACTUAL INACCURACIES IN THE PRESENTENCE REPORT

The Ninth Circuit erred in concluding that the district court's statements regarding alleged factual errors in the presentence report were adequate, despite Respondent's unsupported assertion otherwise. [Opp. 9.] Federal Rule of Criminal Procedure 32 requires courts sentencing defendants under the Federal Sentencing Guidelines to consider alleged factual inaccuracies in presentence reports and make (i) a finding as to the allegations or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. Fed. R. Crim. P. 32(c)(3)(D). While this Court has not yet addressed whether a failure to comply with this rule is a violation of due process, several lower courts have found the failure to

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[4]The decision by the Court of Appeals to publish its decision increases the likelihood that other defendants will be deprived of their rights to defend themselves.

follow this rule a due process violation. *See e.g., United States v. Bruckman*, 874 F.2d 57, 63-64 (1st. Cir. 1989); *United States v. Peterman*, 841 F.2d 1474, 1482-84 (10th Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989); *Poor Thunder v. United States*, 810 F.2d 817, 822 (8th Cir. 1987); *United States v. Eschweiler*, 782 F.2d 1385, 1387-88 (7th Cir. 1986); *United States v. Petitto*, 767 F.2d 607, 611 (9th Cir. 1985); cf., *United States v. Aubrey*, 878 F.2d 825, 828 (5th Cir.) *cert. denied*, 493 U.S. 922 (1989).

The district court did not follow Rule 32(c)(3)(D) in Mr. Winkleman's case. Respondent misinterprets the rule when it states, "[b]y starting with the calculation of loss from the presentence report, the court found specifically that petitioner's objections to the calculation were invalid." [Opp. 9.] Where a defendant raises specific objections to particular facts included in the presentence report, using the report as a "starting point" does not satisfy the requirements of the rule. Merely stating what appears in the presentence report neither means that the court considered and rejected the defendant's contentions of factual inaccuracies, nor does it mean that the court decided to exclude the challenged evidence from the sentencing decision. Rule 32 purposely provides for only these two alternative findings, and a court must articulate one or the other in answering a defendant's objection. Without such articulation the court fails to protect the defendant's due process right to be sentenced on the basis of accurate information. The court also fails to provide a clear record of the disposition of controverted facts.

The harm which results from a failure to abide by Rule 32(c)(3)(D) is not harmless, as illustrated by the following example. A defendant alerts the sentencing court to a factual controversy in the presentence report. Without addressing the defendant's objection, the court states that it will use the report's suggested loss level as the "starting point." The court then tinkers with the sentence by adjusting other factors, resulting in the final recommended range. The court's actions in such a case provide no insight to the defendant as to whether the court found no merit in the defendant's contentions or whether the court disregarded the disputed facts completely and based the sentence

on facts not in dispute. Such was precisely the scenario of Mr. Winkleman's unconstitutional sentencing.

It is impossible to tell from the district court's statements at Mr. Winkleman's sentencing (which was the only record provided by the court) whether the court rejected Mr. Winkleman's claims about the actual number of accounts controlled and tickets obtained or instead ignored both the presentence report and Mr. Winkleman when it determined the value of the loss to American. The court stated:

> Let me make it clear. It's certainly part of the sentencing because of the guidelines. I'm not really sure that I find too much difference between a guy who wants to defraud somebody out of $100,000 than I do out of a million.
>
> [R.T.S. 48-49].

Later in the proceedings the court stated: "As I say, *it wouldn't make any difference to me* if the value here was $2,000. *What he did was the same.*" [R.T.S. 63] (emphasis added). The court's first statement could mean it rejected Mr. Winkleman's objections. The court's later statement suggests that it disregarded both Mr. Winkleman's and the government's asserted loss values, deciding on the length of sentence it desired to impose and finding a loss value which would justify that sentence.

The Ninth Circuit Court of Appeals erred in finding that the district court's loss determination represented either the "fair market value" of American's losses or the $1.3 million suggested by the government "discounted to reflect that [Mr. Winkleman and the other defendants] did not profit from every ticket obtained." *United States v. Mullins*, ____, F.2d ____, WL 1993 118417, *6 (9th Cir. 1993). Not only does the record not support the Ninth Circuit's decision, the Ninth Circuit's finding does not cure the district court's failure to make a specific finding either that Mr. Winkleman's objections were not valid or that the court would not consider the controverted evidence.

The Ninth Circuit made an additional error in violation of Mr. Winkleman's constitutional right to be sentenced based on accurate and reliable information by failing to correct the error

made by the district court when the district court determined the loss level based on "the loss to the airlines *and also the value to the defendants.*" [R.T.S. 95] (emphasis added). No evidence was presented at either trial or sentencing regarding any financial benefit received by any of the defendants as a result of the conduct at issue. [E.R. 27; R.T.T. 656; R.T.S. 51-52.] The loss value need not be determined with precision for sentencing purposes under its guidelines but at least must have some evidentiary basis. The district court could not accurately determine the value to the defendants, assuming such value were even relevant, without the benefit of any evidence on that point. Mr. Winkleman's sentence was therefore based on inaccurate factual information.

The Ninth Circuit cites *United States v. Avila*, in support of its conclusion that the loss calculation in Mr. Winkleman's case was adequate under the circumstances. *United States v. Mullins*, *supra*, 1993 WL 118417, *6. *Avila* is inapplicable to the present case, because in *Avila*, unlike the present case, the defendant did not contest the *factual* accuracy of the presentence report. In *Avila*, the defendant complained that the court did not make the required findings as to how Avila should be classified — whether he should be deemed an "organizer or leader". *United States v. Avila*, 905 F.2d 295, 298 (9th Cir. 1990). In other words, he did not dispute the facts the probation officer used in determining that he should be classified as an organizer; he disagreed with the conclusion.

In contrast, Mr. Winkleman specifically challenged the very basis for the presentence report's loss valuation, pointing out to the court several factual inaccuracies. Due process, as embodied in Rule 32(c)(3)(D), entitled Mr. Winkleman to a sentence based on accurate and reliable information. Under Rule 32, Mr. Winkleman was entitled to specific findings concerning all factual inaccuracies. Absent written findings or evidence in the transcript that the findings were made or the evidence not considered, Mr. Winkleman's sentence was imposed in violation of due process.

III.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

FRED D. HEATHER*
KATHLEEN A. MORAN
MCKENNA & CUNEO
444 South Flower Street
Los Angeles, CA 90071
(213) 688-1000
Counsel for Petitioner

* Attorney of Record
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